IN THE

Supreme Court of the United States

October Term, 1946

No. 719

SPOKANE PORTLAND CEMENT COMPANY, a corporation, and JOHN T. RAFTIS and CHARLES E. BENNETT, Executors of the Estate of W. N. BENNETT, deceased, *Petitioners*,

vs.

CHESTER W. SWANSON, GUY E. SWANSON, HAROLD M. SWANSON, DONALD C. SWANSON, GLENN G. SWANSON, MILDRED IRENE SODERBERG, ALICE M. SWANSON, as executrix of the estate of M. G. SWANSON, deceased, and ELLA PRICE, individually and as administratrix of the estate of HOWARD G. PRICE, deceased, *Respondents*.

BRIEF OF RESPONDENT, ALICE M. SWANSON, AS EXECUTRIX OF THE ESTATE OF M. G. SWANSON, DECEASED, IN CONNECTION WITH THE PETITIONERS' PETITION FOR WRIT OF CERTIORARI, DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Petitioners' question presented (Pet. 6) is, we submit, too broad. It should be limited to situations where only part of the mortgaged land has been taken by condemnation, the question then being: Does the mortgagee get both the non-condemned land and all the award or the non-condemned land and the damage to its security?

OFFICIAL REPORT OF OPINIONS

The opinion of the United States District Court for the Eastern District of Washington, Northern Division, Hon. Lewis B. Schwellenbach, District Judge, is reported under the name of United States v. Bennett et al., at 57 F. Supp. 670; and the opinion of the United States Circuit Court of Appeals for the Ninth Circuit under the name of Swanson et al. v. United States et al., at 156 Fed. 2d 442.

STATEMENT OF THE CASE

Because petitioners' statement is sketchy we feel the necessity of briefly restating the essential facts.

In April, 1942 petitioners' predecessors, having foreclosed a mortgage on about 3000 acres of land in Washington belonging to respondents and their predecessors, bid the full amount of the foreclosure judgement, i.e. $36,586.33, at the sheriff's sale on foreclosure, which sale was duly confirmed, receiving sheriff's certificate therefore.

In November, 1942, during the year of redemption provided by Washington law, the United States of America condemned 340 acres of that tract, tendering into court $10,736.50 in payment therefor.

At the expiration of the year of redemption in April, 1943, no redemption having been made, petioners and their predecessors, as holders of such sheriff's certificate, surrendered the same to the sheriff and received sheriff's deed to the entire 3000 acres, including the 340 acres condemned, thus holding title to some 2660 acres.

Some time thereafter, on a trial as to value, a jury fixed the value of the condemned tract of 340 acres at $31,230.00, which sum with accrued interest is now over $34,000.00, is impounded in the District Court, and the sum over which this lawsuit is being waged.

In December, 1941 and during the pendency of said foreclosure proceeding, petitioners and their pre-

decessors obtained from M. G. Swanson and wife a quit claim deed to the lands in question, wherein Grace Bennett, wife of W. N. Bennett (now deceased but then living), was grantee, which deed remained in the possessoin of petitioners and was not disclaimed as a transfer of title until the trial of title in this action in August, 1944 (R. 70).

The trial court found "that redemption from such foreclosure by the Swansons was for practical purposes prevented by said condemnation proceedings" (R. 70), and the Circuit Court of Appeals made a similar finding (R. 117, 185).

The trial court directed the entire condemnation fund of $31,230.00 paid over to petitioners. This, the Circuit Court of Appeals reversed, holding that petitioners were limited to a lien upon the condemnation fund for the damage to their security by reason of the taking of a portion of the lands covered by the sheriff's certificate and for the determination of which damage the non-condemned land now owned by petitioners must be "evaluated" (R. 184). No evidence of damage to petioners' security was offered on the trial by petitioners (R. 100). In their statement of the matter involved, petitioners on page 5 of their petition indicate that the Circuit Court of Appeals opinion provided that the value of the non-condemned land is "to be determined by evidence." Such is not a correct statement for the Opinion (R. 187) makes no reference to evidence.

SUMMARY OF ARGUMENT

1. There is no conflict between the decision of the Circuit Court of Appeals for the Second Circuit in United States v. Lands in Hempstead, Nassau County, New York, 129 Fed. 2d 918, and the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case at bar.

2. Where, after foreclosure and before title vests in the purchaser at the mortgage sale, a portion of the mortgaged lands are taken in condemnation, the purchaser has a lien on the condemnation fund for the damage to his security by the taking.

3. The United States Circuit Court of Appeals for the Ninth Circuit, under its equitable powers expressly granted by statute, had power to make distribution of the award as it did.

ARGUMENT

I.

United States v. Lands in Hempstead, Nassau County, New York (C.C.A. 2), 129 Fed. 2d 918, involved foreclosure of a tax lien under the laws of New York followed by a tax sale, and a condemnation during the statutory period of redemption. It did not involve a mortgage. The condemnation was of the entire tax tract, not a part of it as here.

Weber v. Wells (C.C.A. 9), 154 Fed. 2d 1004, which petitioners attempt to distinguish, is a case

which on its facts is similar to the Hempstead case. The reference therein to a "book transaction" does not in the least affect the matter in hand as suggested by petitioners (Pet. 17). It involved, of course, California tax laws. In it, the Ninth Circuit expressly refused to follow the Hempstead case as affecting the tax foreclosure laws of California holding that all the tax title holder could get was the damage to his security.

This court, in Ruhlin v. New York Life Ins. Co., 304 U. S. 202, has held that as to questions controlled by state law a conflict among circuits is not of itself a reason for granting certiorari.

The rights of petitioners are to be determined as of the date of the taking in condemnation, Danforth v. United States, 308 U. S. 271-283. At that time the petitioners had only a lien. Atwood v. McGrath, 137 Wash. 400, 242 Pac. 648. Their rights are to be determined by state law, 40 U.S.C.A. No. 258 *a*, 46 Stat. 1421; Abraham v. Casey, 179 U. S. 210.

Incidentally, the court in the Hempstead case did not refer to the exception in New York, viz. that where after mortgage sale part of the land is condemned, the mortgagee can only participate in the award to the extent of his deficiency or damage to his security. In re Bowry Savings Bank, 284 N.Y.S. 232; Utter v. Richmond (N. Y.), 20 N.E. 554.

II.

Where a mortgagee has foreclosed and condemnation follows, he has a lien for his deficiency if one exists, or for the damage to his security. Since petitioners bid the full amount on the foreclosure sale they had no deficiency, so their lien against the award could only be for the damage to their security, which is arrived at by crediting the bid with the value of the non-condemned property. Though the burden was on them, petitioners offered no proof of such damage. Gray v. Davison, 78 Wash. 482-487, 139 Pac. 219; Commercial Bank v. Johnson, 16 Wash. 536, 48 Pac. 267. And such is in accord with equitable principles. Calumet River R. Co. v. Brown (Ill.), 26 N.E. 501, 12 L.R.A. 84; In re Bowery Savings Bank, supra; John Hancock Mutual Life Ins. Co. v. Casey (C.C.A. 2), 147 Fed. 2d 762-766; Fidelity Philadelphia Trust Co. v. Kraus (Pa.), 190 Atl. 874, 110 A.L.R. 538.

III.

The statute, Section 1, of the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U.S.C.A. No. 258 *a*, clothes the Court with power to make such orders in respect to encumbrances, liens ***** as shall be just and equitable. The state law does not control the manner of distribution. John Hancock Mutual Life Ins. Co. v. Casey supra; U. S. v. Certain Lands in Brooklyn, 129 Fed. 2d 577-579.

Both the trial Court and the appellate Court found that the condemnation prevented a redemption (R. 70, 177, 185). A bar to redemption was a deed taken for petitioners from the Swansons while foreclosure was pending (R. 70). This deed was held by petitioners until long after the year of redemption had expired, when, on the trial of title, they disclaimed it. Obviously, any attempt by the Swansons to redeem would have met with the resistance of this deed, which seems to have been obtained and held to use as the wind might blow.

Petitioners' bid at sheriff's sale of $36,586.33 fixed the value of the 3000 acres. Petitioners suggest it is equitable they have 89% of land and also have all the $32,100.00 award. All this, for a mortgage for which they paid but $500.00 (R. 72).

Petitioners suggest that respondents could have taken down the condemnation tender of $10,736.50 and used it in redeeming. Such suggestion overlooks two facts— one, that the quit claim deed above referred to would undoubtedly prevent the exercise of redemption as suggested; and, two, it would mean a loss of over $20,000.00 to the Swansons considering the jury's later fixing of value; and, after all, the Swansons were impoverished and had no other

means of redemption (R. 69). Quite different were the facts in the Hempstead case. There, the condemnation fund exceeded the amount necessary to redeem.

Respectfully submitted,

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